United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2376

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Plaintiff-Appellee, Docket No. 74-2376

-against-

DREW LORD DEVEREAUX,

Defendant-Appellant.

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(ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK)

DEFENDANT-APPELLANT'S BRIEF

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UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against- Docket No. 74-2376

DREW LORD DEVEREAUX,

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(ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK)

QUESTIONS PRESENTED

1. Whether the action by the court below of striking the words "in writing" from the indictment in this case constituted an unlawful judicial amendment of the indictment requiring reversal of defendant's conviction and dismissal of the indictment.

2. Whether the evidence adduced at trial required acquittal because the appellant, in good faith, provided the Selective Service System with a chain of forwarding addresses by which he could reasonably expect that mail would reach him, and whether the court's charge to the jury with regard to such question was improper as a matter of law.

3. Whether the court properly instructed the jury with regard to the criminal intent necessary for appellant to be convicted of the charge of failure to keep his local Selective Service board advised at all times of the address where mail would reach him.

STATEMENT OF THE CASE

This is an appeal from a judgment of the United States District Court for the Southern District of New York, convicting the defendant after a jury trial of a violation of the Military Selective Service Act of 1967, 50 App.U.S.C. § 462. Drew Devereaux was charged in a one-count indictment with failing to comply with the Selective Service regulations, 32 C.F.R. § 1641.3, and § 1641.1, which require registrants to advise their local board of an address where mail will reach them. On May 31, 1974, the jury handed down a verdict of guilty. On September 10, 1974, the court, the Honorable Charles L. Brieant, Jr., sentenced defendant, as a youthful offender, to sixty days' observation in a youth corrections institution, pursuant to 18 U.S.C. § 5010(e). The court granted a stay of judgment pending appeal, and the appellant is presently free on his own recognizance. This appeal is brought in forma pauperis,

and counsel has been appointed by the Court, pursuant to the Criminal Justice Act.

The Indictment.

Because of the importance of its wording to this appeal, the indictment is set out here in toto as follows:

> "The Grand Jury charges:
>
> From on or about the 6th day of June, 1972, to on or about the 7th day of September, 1973, in the Southern District of New York, DREW LORD DEVEREAUX, the defendant, unlawfully and knowingly did fail, neglect and refuse to perform a duty required of him under and in execution of the Military Selective Service Act of 1967, Title 50 Appendix, United States Code, Section 451 et seq., and the rules, regulations and directions made pursuant thereto, in that he, being a registrant, required to keep his local board currently informed in writing of the address where mail would reach him, unlawfully and knowingly did fail, neglect and refuse to keep his local board advised of the same.
>
> (Title 50 Appendix, United States Code, Section 462(a); 32 C.F.R. 1641.3, 1641.1)"
>
> (Emphasis added)

At the opening of the trial in this action, the attorney for DREW DEVEREAUX brought to the attention of the court the fact that the indictment charged Drew with

failure to keep his local board currently informed "in writing" of an address where mail would reach him. Drew's counsel pointed out that there was no such requirement in either the applicable statute or regulations, and asked that the words be stricken from the indictment (Tr. 2-5).[1] The court refused to grant counsel's request or to take any action with respect to the words "in writing" contained in the indictment.

In his opening statement to the jury, the Assistant U. S. Attorney, Michael Q. Carey, Esq., stated that the defendant DREW DEVEREAUX "had a duty to advise the Selective Service Board in writing of an address where mail could reach him . . ." [emphasis added] (Tr. 14)

The case then proceeded to trial and the evidence for both the prosecution and the defense was presented. At the conclusion of the trial, Judge Brieant held a conference in chambers. At that time, Judge Brieant asked counsel for the defendant to restate his position with regard to the presence of the words "in writing" in the indictment (Tr. 313). It was noted that the court had not yet read the indictment to the jury (although the U. S. Attorney had

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[1] References are to pages in the transcript of the trial.

mentioned the words in his opening). Counsel for DREW DEVEREAUX moved for dismissal of the indictment, as follows:

> "MR. DWORKIN: Certainly I would move to dismiss the indictment if I am in a position to do so on that basis, but the real objection is that there is no such requirement that any notification be in writing. It is not that there is an issue of whether notification was in writing or not in this case. It is just that if we had read requirements that are not in issue to a jury, it may confuse them and somewhere along the line someone may think that the defendant did not comply with it, whether there is evidence of that or not."
>
> (Tr. 313)

Judge Brieant ignored this motion for dismissal of the indictment and instead, engaged in the following colloquy:

> "THE COURT: Do you still contend that I ought not to read the "in writing"?
>
> MR. DWORKIN: Yes.
>
> THE COURT: I think you may have a point there. I am prepared to go along with that request.
>
> MR. CAREY: Your Honor, the Government has no objection.
>
> THE COURT: All right.
>
> MR. DWORKIN: As I recall, you did not read it --
>
> THE COURT: I have not read the indictment.

MR. DWORKIN: -- at the beginning of the case, and no mention was made of the "in writing".

THE COURT: No it was of some concern to me, and I wanted to give it further thought and I had not had a chance to read that Tenth Circuit case which you had.

MR. CAREY: It is clearly not in the regulation, your Honor. That is the reason for my consenting.

THE COURT: All right. It is confusing; that is the main thing."

(Tr. 313-314)

By this means, the court struck the words "in writing" from the indictment. When Judge Brieant, in his charge, read the indictment to the jury, he eliminated the words "in writing". (Tr. 362)

Statement of Facts.

DREW DEVEREAUX registered with Local Selective Service Board No. 8, New York, New York, on July 3, 1970. In September of 1970, Drew's parents decided to move to the Bahamas, and because he could not go with them, Drew dropped out of high school, left home, and went to Ohio to get a job. (Tr. 144, 168, 170, 175-176) Thus, at the age of 18, Drew was completely on his own. His arrival in Dayton, Ohio in 1970 set the pattern for his life during the next four years--

a pattern of continued wandering from place to place, living at many different locations, holding many different jobs. Drew described his 1970 move to Ohio in a statement read at trial by Drew's counsel:

> "My parents were leaving the country in a couple of weeks or so, and I did not wish to go with them, since I would not" -- I will leave out some words because of your Honor's ruling -- "be likely to obtain a job. Instead I decided to go to Dayton, Ohio, because I had a friend there who said there were many jobs available, plenty of cheap apartments, and it would be easy to get back into school there. My parents gave me some money to buy clothes. My parents said goodbye. I got some money from my uncle for expenses and a cheap apartment when I got there.
>
> "Upon arrival at Dayton, I found the situation to be almost exactly the opposite of what my friend had told me. I found myself living on the street, in various people's garages, because no one would rent me an apartment on account of my long hair. After a week, during which I prayed constantly for help and guidance, I started staying in the back of a new friend's Corvair along with two other people and himself. I lived there for about a week and a half, during which time we were constantly being hassled by the cops.
>
> "Then one of the guys left for Columbus, the guy who owned the car went to Arizona, one of the boys and myself obtained two $11 a week apartments through his mother. I thanked God for the good fortune and prayed for continued guidance.

"Some time passed and I still did not have jobs --"

(Tr. 175-176)

The pattern of life begun in September, 1970 continued through the period charged in the indictment. At the trial, various witnesses, including an F.B.I. agent, an Assistant U. S. Attorney, and Drew himself, testified that Drew had lived at many different addresses from June, 1972 to September, 1973. They included locations in Cleveland, Ohio, Moraine, Ohio, Dayton, Ohio and Miamisburg, Ohio. (Tr. 88-89, 117-118, 171-177, 181-182) Drew testified that during the period in the indictment, he had at least four or five separate permanent residences, and that there were at least seven to ten other temporary residences. (Tr. 177-178)

At various times, Drew provided the Board with the names of people who would know his mailing address. At the time of his registration with Local Board No. 8 (July 3, 1970), Drew Devereaux listed his uncle, Ian Henderson, of 944 Park Avenue, New York, New York, as a person who would always know his address.

On October 8, 1971, Drew sent a letter to the Board, informing it that he was at the address of Mary Stewart

(a friend of his parents), at 2680 Morland Blvd., Apt. 6, Cleveland, Ohio (Tr./180-181).[39]

In addition, in August, 1972, Drew filed with the Board a special form for conscientious objectors, SSS 150. Under Series III entitled "References", Drew listed as references his parents, J. D. Devereaux and J. H. Devereaux, c/o Henderson, P. O. Box 1076, Lyford Cay, Nassau, Bahamas, and Marcia Tabor, 1724 Xenia Avenue, Dayton, Ohio 45424 (Tr. 209).

The Government introduced evidence that, during the period involved in the indictment, a number of notices were sent to the address of Mary Stewart in Cleveland, Ohio, and that these notices were returned on account of improper address (Tr. 42). However, Drew Devereaux testified at the trial that, after leaving the address of Mary Stewart in Cleveland, he moved to Dayton, Ohio, and that he wrote Miss Stewart a letter, giving her his address in Dayton, and asked her to forward to him all communications that he might have received from the draft board (Tr. 183, 227, 277). He was then living with his fiancee, Marcia Tabor, at Huber Heights, in Dayton. It was at this address in Huber Heights that Drew received from his local board -- during the period involved in the indictment -- the SSS

Form 150, Special Form for Conscientious Objectors (Tr. 184).

On June 30, 1972, in an effort to locate Drew Devereaux, Local Board No. 8 sent a letter to Ian Henderson, whom Drew had listed as a person who would know his address (Tr. 35). Henderson responded by July 10, 1972, with the following statement: "HAVE NOT SEEN OR HEARD FROM THE ABOVE SINCE JUNE 1971 -- HIS PARENTS' ADDRESS IS - JOHN DREW DEVEREAUX, P. O. BOX N-7776, NASSAU BAHAMAS". (Tr. 65) After that, the local board sent a letter addressed to Drew's parents, but instead of using the address given by Henderson (P. O. Box N-7776), the board addressed the letter to P. O. Box 1076, Lyford Cay, Bahamas (Tr. 65-66).

At the trial, John Drew Devereaux, father of the defendant Drew Lord Devereaux, testified that in September, 1970, he and his wife moved to the Bahamas. He testified that in early 1971, prior to the period involved in the indictment, while he was a resident of Lyford Cay in the Bahamas, his address changed from Box No. 1076 to Box N-7776 (Tr. 144). Mr. Devereaux testified that during the entire period of the indictment, his box number was N-7776 (Tr. 140). He further testified that during the entire period of the indictment, he never

received any communications whatsoever from the Selective Service System (Tr. 139-140). Mr. Devereaux testified that, throughout the pertinent period, he was in regular contact with Drew, that Drew regularly called him on the telephone, and that on each such occasion, Drew informed his father of his current address (Tr. 141). Mr. Devereaux testified that his son called him each time he moved to a new address, but that they never discussed matters concerning the Selective Service System (Tr. 151-153). Drew Devereaux testified that during this period he did not know of the change in the box number of his father's address (Tr. 191).

As has already been noted, as a reference in his Conscientious Objector form, Drew gave the address of Marcia Tabor, 1724 Xenia Avenue, Dayton, Ohio. This became quite an issue at the trial. Upon the cross-examination of Drew by the Assistant U. S. Attorney, Drew testified that beginning in approximately August or September, 1973, until approximately January of 1973, he lived with his fiancee, Marcia Tabor, in an apartment on the corner of Xenia and Carlisle Avenues in Dayton, Ohio. The U. S. Attorney closely examined Drew to show that in fact the address of the apartment was 1724 Carlisle Avenue, not

1724 Xenia Avenue (Tr. 352-353). Drew testified that he was not exactly sure of the address of the apartment, as he received his mail at another location, but pointed out that it was a two-story apartment on the corner of Carlisle and Xenia (Tr. 193-198). In his summation before the jury, the Assistant U. S. Attorney stressed that the address given on the conscientious objector form had been incorrect, and that in fact, Drew actually had lived at 1724 Carlisle Avenue, instead of 1724 Xenia (Tr. 352-353).

In 1973, Drew received two visits from the F.B.I. The first was on September 6, 1973, when Drew was visited in Dayton, Ohio. Agent Brauner of the F.B.I. questioned Drew concerning his failure to keep his local board informed of his whereabouts. Drew told Agent Brauner that he did not know that he had to keep the board informed of an address where mail could reach him, because he thought the draft had ended December 31, 1972 (Tr. 89-90, 184-185). Agent Brauner told Drew to immediately contact the Selective Service System and inform them of his address. Brauner told Drew that to do so might remove his delinquency (Tr. 90). Drew immediately went to the local Selective Service Board in Dayton, and gave the board his current mailing address (Tr. 54).

On December 19, 1973, after Drew had contacted the board in Dayton and given his current address, he was arrested by Agent Brauner (Tr. 90-91). At the time that he was arrested, Drew told Agent Brauner that Mr. Ian Henderson of New York City was a person who would be aware of his whereabouts (Tr.92).

The evidence elicited at trial showed that it was Mr. Henderson's information which ultimately led the F.B.I. to Drew Devereaux. Agent Brauner' first effort to find Drew led him to a trailer at 4462 Fargo Drive, Moraine, Ohio (Tr. 77-78). That address had been furnished to the F.B.I. by Mr. Henderson (Tr. 96). It so happens that that was a correct address for Drew's residence during a large portion of the period covered by the indictment. The evidence at trial showed that from approximately January, 1973 to July, 1973, Drew did live at 4462 Fargo Drive, Moraine, Ohio (Tr. 119-120).

It is perhaps reasonable to assume that although Mr. Henderson had indicated to the Selective Service Board that he had not seen or heard from Drew Devereaux since 1971, he was aware of Drew's address and was able to furnish that address to the Selective Service System. As it turned out, he did furnish the address to the F.B.I.

POINT I.

THE COURT EFFECTED AN UNLAWFUL JUDICIAL AMENDMENT OF THE INDICTMENT BY STRIKING THE WORDS "IN WRITING" THEREFROM.

The indictment in this action was handed down by a duly constituted Grand Jury. The Grand Jury did not simply charge Drew Devereaux with failure to keep his

Selective Service Board informed of an address where mail could reach him. It charged him with failure to keep the board so advised "in writing". By striking those words from the indictment, and by presenting the case to the jury at trial as a simple case of failure to keep the board informed of his whereabouts, the trial judge unlawfully amended the indictment handed down by the Grand Jury. That amendment went to the very heart of the charge against Drew Devereaux. It was not simply a matter of form, or surplusage of language, but rather, of the essential requirement set out in the Selective Service Act and regulations. There is an important difference between the requirement to keep the Selective Service Board informed "in writing" of an address where mail can reach you, and a requirement simply to keep it informed. Under the indictment, as handed down by the Grand Jury, the defendant would have had a strong defense. The indictment as emasculated by the court, completely changed the nature of the charge against the defendant, and eliminated the defense which might have been raised.

The Supreme Court long ago held that a trial court cannot amend an indictment by deleting words from

the charge. Ex parte Bain, 121 U.S. 1 (1887).

The Supreme Court has repeatedly asserted that a trial court may not amend the charging part of an indictment, because to do so substitutes the intention of the court for the intention of the Grand Jury. The principle is thoroughly set out in Russell v. United States, 369 U.S. 749, 770 (1962):

> "To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him. See Orfield, Criminal Procedure from Arrest to Appeal, 243.
>
> This underlying principle is reflected by the settled rule in the federal courts that an indictment may not be amended except by re-submission to the grand jury, unless the change is merely a matter of form. Ex parte Bain, 121 US 1, 30 L ed 849, & S Ct 781; United States v Norris, 281 US 619, 74 L ed 1076, 50 S Ct 424; Stirone v United States, 361 US 212, 4 L ed 2d 252, 80 S Ct 270. 'If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if they're attention had been called to suggested changes,

> the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the Constitution says 'no person shall be held to answer', may be frittered away until its value is almost destroyed."

As the court pointed out in Russell v. United States, supra, a judicial amendment to the indictment deprives the defendant of his rights under the Fifth Amendment to the United States Constitution: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury . . . ."

The courts have steadfastly adhered to the doctrine that trial courts may not change the wording of the charging portion of an indictment. Deletions from and additions to the wording of an indictment are clearly impermissible where such modification concerns the substance of the charge. Such an amendment is grounds for reversal of the conviction. Sitrone v. United States, 361 U.S. 212 (1960); United States v. Norris, 281 U.S. 619 (1930); Gaither v. United States, 413 F.2d 1061, 1071-72 (D.C. Cir. 1969); United States v. Goldstein, 502 F.2d 526 (3d Cir. en banc 1974); United States v. De Cavalcante, 440 F.2d 1264, 1270-72 (3d Cir. 1971); United States v. Fischetti, 450 F.2d 34, 39 (5th Cir.

1971), cert. den. 405 U.S. 1016 (1972); Jeffers v. United States, 392 F.2d 749 (9th Cir. 1968); United States v. Ortiz, 324 F.Supp. 417 (S.D.N.Y. 1971).

The proper course for the court below to have taken in the case at bar would have been to dismiss the indictment. Defendant's counsel moved for dismissal of the indictment as follows:

> "MR. DWORKIN: Certainly I would move to dismiss the indictment if I am in a position to do so on that basis . . . ."
>
> (Tr. 313)

By not ruling on the motion, the court, in effect, denied the motion. However, Judge Brieant did express a willingness to strike the words from the indictment. The mere fact that counsel for the defendant may have appeared to acquiesce in the court's action does not in any way defeat this ground for reversal. An indictment may not be judicially amended, even with the express consent of the defendant. United States v. Williams, 412 F.2d 625, 627 (3d Cir. 1969); United States v. Anzelmo, 319 F.Supp. 1106, 1125 (E.D.La. 1970). The principle was stated by Circuit Judge Burger (now Chief Justice Burger) in the case of Crosby v. United States, 339 F.2d 743, 744 (D.C. Cir. 1964):

> "The Government relies primarily on appellant's failure to object to the dangerous weapon charge; and without doubt this contributed substantially to the District Court's action. The Government asserts, in effect, that appellant has waived his right to be charged by a grand jury for the precise offense of which he was convicted. We cannot agree. The scope of the indictment goes to the existence of the trial court's subject-matter jurisdiction. Stirone v. United States, 361 U.S. 212, 213, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960); Ex Parte Bain, 121 U.S. 1, 12-13, 7 S.Ct. 781, 30 L.Ed. 849 (1886).
>
> * * *
>
> "To hold otherwise would in effect be to allow judicial amendment of the grand jury's indictment; this cannot be accomplished even with a defendant's consent. The Supreme Court has ruled that the Fifth Amendment's guarantee may not be so undermined. Stirone v. United States, supra; Ex Parte Bain, supra. Accordingly, we reverse appellant's conviction."
>
> 339 F.2d at 744-745 (emphasis added)

The words "in writing" constituted a significant element of the charging part of the indictment againt Drew Devereaux. Their elimination clearly prejudiced the defendant. The courts have stated that one test as to whether an amendment prejudices the defendant is whether a defense available under the old indictment would also be available under the indictment as amended by the judge. United States

v. Fawcett, 115 F.2d 764, 767 (3d Cir. 1940); United States v. Owens, 334 F.Supp. 1030 (D. Minn. 1971). In Owens, supra, the court quoted Fawcett and set forth the test as follows:

> "A final safeguard to protect the defendant's rights is to determine whether an amendment to the indictment is prejudicial. The test used in determining possible prejudice is:
>
> '. . . whether a defense under an indictment as it originally stood would be equally available after the amendment is made, and whether any evidence the defendant might have would be equally applicable to the indictment in the one form as in the other.' Fawcett, supra, 115 F.2d at 767.'"
>
> 334 F.Supp. at 1032

Under the old indictment, Drew Devereaux would have had a substantial defense. He could have argued that the indictment must be dismissed because there was no requirement in the statute or regulations that he notify the local board in writing of an address where mail could reach him. The regulations governing this question were 32 C.F.R. §§ 1641.1 and 1641.3. In his charge to the jury, Judge Brieant read those regulations:

> "The regulation which I have just mentioned reads in pertinent part as follows, that is, Section 1641.1 -- you will not need to remember the numbers of these:

'Notice of requirements of military Selective Service Act of 1967.'

'Every person shall be deemed to have notice of the requirements of the military Selective Service Act of 1967.'

Section 1641.3, entitled 'Communication by Mail', reads:

'It shall be the duty of each registrant to keep his local board advised at all times of the address where mail will reach him.'"

(Tr. 363)

Clearly those regulations contain no requirement that the board be kept informed "in writing". Such was the holding in United States v. Fisher, 456 F.2d 1143 (10th Cir. 1972). In that case, the registrant was accused of violating the same regulation as the one cited in the indictment against Drew Devereaux and read by the court to the jury. The Tenth Circuit reversed Fisher's conviction, and held as follows:

"We agree that it was error for the trial court to instruct the jury that Count II requires that a registrant submit a written communication of his current mailing address to the board."

* * *

"It is a general rule that regulations and statutes must be construed in favor of the accused and cannot be enlarged by

> judicial construction beyond the language used. United States v. Boston & Maine Railroad, 380 U.S. 157, 85 S.Ct. 868, 13 L.Ed.2d 728 (1965); United States v. Resnick, 299 U.S. 207,57 S.Ct. 126, 81 L.Ed. 127 (1936); Farmer v. United States, 128 F.2d 970 (10th Cir. 1942)."
>
> 456 F.2d at 1145

The court in United States v. Fisher, supra, pointed out that the regulation requiring a registrant to keep his local board informed of an address where mail may reach him (32 C.F.R. § 1641.3) is quite different from another regulation requiring a registrant to keep a board informed of his "home address".(32 C.F.R. § 1641.7). In Fisher, the defendant had not been charged with violating that other regulation, 32 C.F.R. 1641.7. So also, in the case at bar, Drew Devereaux was never charged with violating § 1641.7, and at no time was it mentioned in the case or read to the jury.

Thus, the effect of the action taken by Judge Brieant was to wipe out a defense which not only required dismissal of the indictment, but also would have entitled the defendant to a reversal on appeal if convicted. The action was severely prejudicial to the defendant and should not be allowed by this court to stand.

POINT II

THE APPELLANT PROVIDED A CHAIN OF FORWARDING ADDRESSES BY WHICH HE COULD REASONABLY EXPECT MAIL TO COME INTO HIS HANDS IN TIME FOR COMPLIANCE, AND THE COURT'S CHARGE TO THE JURY ON THIS QUESTION WAS IMPROPER.

The general rule regarding the obligation of a registrant to keep his draft board informed of an address where mail will reach him is now pretty well understood. He doesn't have to notify the board every time he moves. He simply has to leave a chain of forwarding addresses by which he can anticipate that he will receive mail sent to him by the Selective Service Board, and that he will receive it in time for compliance. The rule was laid down by the Supreme Court in the case of Bartchy v. United States, 319 U.S. 484, 489 (1943):

> "The regulation, it seems to us, is satisfied when the registrant, in good faith, provides a chain of forwarding addresses by which mail sent to the address which is furnished the Board, may be by the registrant reasonably expected to come into his hands in time for compliance."

If the defendant left such a chain of forwarding addresses, and if by doing so, he could reasonably expect

that mail sent to him by the Selective Service Board would reach him in time for compliance, then he should have been acquitted of the charges against him. See, Venus v. United States, 368 U.S. 345 (1961); Ward v. United States, 344 U.S. 924 (1953); United States v. Haug, 150 F.2d 911 (2d Cir. 1945); United States v. Burton, 472 F.2d 757, 762 (8th Cir. 1973); United States v. Ebey, 424 F.2d 376 (10th Cir. 1970); United States v. Fisher, supra; United States v. Hammonds, 1 SSLR 3285 (D. S.C. 1968).

In the case at bar, Drew Devereaux left his local board with several addresses by which mail not only could but did reach him. The first and most significant of these is the address of his uncle, Ian Henderson, who lived at 944 Park Avenue, New York, New York. Mr. Henderson indicated to the local board that he had not seen or heard from Drew Devereaux and therefore, quite properly, notified the board of the address of Drew's parents in the Bahamas. Surely the board could assume that in the absence of other evidence, Drew would be living with his parents. Nevertheless, it failed to write Drew's parents at their correct address. The address provided by Mr. Henderson was P. O. Box N-7776, Nassau, Bahamas (Tr. 65). The board addressed its communication to an outdated address, P. O. Box 1076,

Lyford Cay, Bahamas (Tr. 65-66). Had the board followed Mr. Henderson's advice, it would have promptly and efficiently contacted the registrant through his parents, and this case would never have come up in the first place.[2]

The evidence at trial showed that Drew Devereaux's parents were in regular communication with him and always knew his current address (Tr. 139-153). The chain of addresses from Ian Henderson through Drew's parents directly to Drew satisfied the requirements set out in United States v. Bartchy, supra. Nevertheless, Judge Brieant, in his charge to the jury, instructed the jury in such a way that it was required to disregard Drew's action of supplying the draft board with the address of Mr. Henderson. In his charge to the jury, Judge Brieant stated as follows:

---

[2] While it may be true that Selective Service Boards no longer have the obligation under the old regulation (32 C.F.R. § 1642.41(b)) to go looking for the defendant, its failure to follow through on addresses given by responsible people should not result in a penalty to the registrant. The regulation was eliminated by the Selective Service System in 1971. Nevertheless, courts continue to acquit defendants of such a charge if the period covered in the indictment included years when the regulation was in effect. Cf., United States v. Chudy, 474 F.2d 1069 (9th Cir. 1973); United States v. Buckley, 452 F.2d 1088 (9th Cir. 1971); United States v. Burton, supra.

> "In this case you are being asked to determine whether the defendant, when he terminated his residence with M. L. Stewart, discharged this obligation by any of several possible means. First, he could have discharged his obligation by notifying the local board of his new mailing address, himself, or by having someone else do so in his behalf. Or he could have complied by notifying the local board of the name and address of someone described in this case as a person who will always know the registrant's address, someone other than Mr. Henderson, Mr. Ian Henderson, whom you will recall he had originally given to the draft board as the person who would always know his address. Or he could have complied by leaving with Mr. Ian Henderson a forwarding address where he could be contacted by mail. Or he could have complied by leaving with M. L. Stewart or at any other place of abode he may have had on leaving Stewart's address an adequate chain of forwarding addresses so that mail would reach him."
>
> (Tr. 368-369) (emphasis added)

The effect of this charge is at best to confuse the jury. What the Judge was saying to the jury was that Drew Devereaux's original act of giving the board Mr. Henderson's name and address as a person who would always know an address where mail could reach him, was insufficient under the law. He is telling the jury that when Drew left M. L. Stewart's address, he had to actually call Mr. Henderson and tell him his current address in order to satisfy the

requirements of 32 C.F.R. 1641.3. But that is not the law. Under the law, it was sufficient that Mr. Henderson knew the address of Mr. and Mrs. John Drew Devereaux, the parents of the defendant. Mr. Henderson's advice of that address to the local board provided the chain by which Drew could easily have been reached in time for compliance with whatever orders the local board had to give him. The error made in the court's charge was compounded when the judge refused to charge the jury that Ian Henderson could be considered a man of suitable discretion and relationship that Drew had every reason to believe that Mr. Henderson would send a Selective Service communication to his father (Tr. 384).

These facts, taken together with Drew's testimony that he kept Mary Stewart advised of his address in Dayton, and the references set forth on his conscientious objector form filed in August, 1973, show a real effort on the part of the defendant to comply with the law. On the basis of this evidence, the court should have acquitted the defendant at the end of the Government's case.

The facts in this case are not unlike those in United States v. Burton, supra, where the court reversed

stating as follows:

> "In the present case, the defendant moved for a judgment of acquittal on Count II at the close of the government's case. At that time, the evidence showed that the defendant had furnished the board with the address of his mother as the person who would always know his whereabouts. It also showed that the board had not attempted to contact the mother in order to reach the defendant. In view of the cases cited above, the defendant was entitled to rely on his mother's address to meet his duty of informing the board of 'the address where mail will reach him.'"
>
> 472 F.2d at 763.

Drew Devereaux was entitled to rely on Ian Henderson's address to meet his duty of informing the board of an address where mail would reach him.

POINT III.

THE COURT IMPROPERLY INSTRUCTED THE JURY REGARDING THE INTENT NECESSARY FOR THE COMMISSION OF THE CRIME.

A reading of the transcript in this case shows that Drew Devereaux, an aimlessly wandering young man, moving from place to place, was caught up in a set of circumstances he never fully understood. By relentless prosecution, the Government succeeded in convincing a court and jury that what

was in reality negligence should be treated as a serious criminal violation.

The Government presented no evidence at trial that Drew Devereaux deliberately evaded his responsibilities to the draft. Instead, it showed the familiar pattern of a young man leaving home, travelling around, forgetful of his obligations, always assuming in his mind that his parents would inform him of any duties he had to the draft board. When Drew was eventually contacted by the F.B.I., he told the F.B.I. that he didn't know he was still obligated to keep the board informed of his whereabouts because he thought that that obligation had ended when the war was over (Tr. 89, 184-185). Nevertheless, Drew immediately went to the local board in Dayton and brought them up to date on his current address (Tr. 90). He told the F.B.I. that he considered his uncle Ian Henderson one who would always know his whereabouts (Tr. 92), and testified that he had never learned of his father's change of address from box number 1076 to N-7776 (Tr. 191).

In other words, although Drew didn't call the Selective Service Board every time he made one of his many, many moves, he did think that mail would reach him either

through Mary Stewart, Ian Henderson, or his parents. The whole record is replete with instances showing Drew's reliance upon these sources. Nevertheless, the court's charge to the jury was so confusing as to enable it to convict Drew simply for negligence rather than criminal conduct.

In his charge to the jury, Judge Brieant stated:

> "In order to find the defendant knowingly violated the duty to keep his local board advised of an address where mail would reach him, you must be satisfied that he was aware of his duty to do so. Thus, upon all the evidence, if you find that the defendant deliberately and purposely refused to perform the duty required of him, then his conduct is unlawful unless legally justified and excused. Should you find that the defendant knew that he had a duty to keep his local board advised of an address where mail would reach him and that he failed or neglected to perform or deliberately chose not to perform such duty, then the basis or reason or motivation for the failure, neglect or refusal makes no difference."
>
> (Tr. 365) (emphasis added)

The above words by Judge Brieant clearly prejudiced the entire case of the defendant. The effect of these words was to tell the jury that even if Drew Devereaux really and truly believed that he would receive mail from the

Selective Service System through his uncle, Ian Henderson, or from Mary Stewart or from his father, nevertheless, the jury had to find him guilty if he knew of his obligation and "failed or neglected" to perform the duty required of him. Note that in his charge, Judge Brieant uses the words "failed or neglected . . . or deliberately chose not to" in the disjunctive. Any jury with common sense would assume from the judge's charge that guilty knowledge and willfulness can be implied simply from negligence on the part of a Selective Service registrant, and that the "basis or reason or motivation for the failure" makes no difference.

Surely this improper and incorrect charge could not be cured by later references in the charge to intent and willfulness. The judge had already implanted in the minds of the jurors the concept that they had a right to convict Drew Devereaux of a federal felony offense solely on the basis of his sloppiness and lack of care. The world is full of disorganized people, but it seems unfair that those fastidious persons who reach the top should raise the tort of negligence to the level of a crime and hustle off the slovenly to jail.

The burden is upon the Government to show that "during this period [involved in the indictment] there was

deliberate purpose on the part of [Drew Devereaux] not to comply with the Selective Service Act or the regulation issued thereunder". Ward v. United States, 344 U.S. 924 (1953). It is particularly important in a case of this kind that the Government prove beyond a reasonable doubt a deliberate intent on the part of the defendant not to comply with the regulations. Venus v. United States, 368 U.S. 345 (1961); Graves v. United States, 252 F.2d 878 (9th Cir. 1958); United States v. Figurell, 462 F.2d 1080 (3d Cir. 1972).

In the Ward case, supra, the Supreme Court summarily reversed the conviction of a defendant who had failed to keep his local board informed of his whereabouts. The facts in the Ward case are strikingly similar to those in the case at bar, and therefore, it is appropriate to quote from the statement of those facts in the opinion of the Circuit Court of Appeals which had affirmed the conviction. Ward v. United States, 195 F.2d 441, 442 (9th Cir. 1952):

> "On the trial of the case before a jury, the defendant testified that he had frequently changed his residence in New York City; that he had not notified the Board of such changes for the reason that he had listed his employer's address in the questionnaire that he had completed and returned to the Board; and that he had relied on that address as fulfilling the requirements of furnishing the Board with an address where mail might reach him."

The proper principle regarding intent is set out in United States v. Figurell, supra, as follows:

> "In order to convict Figurell of a violation of 50 U.S.C. App. §462, the United States was required to prove not only that Figurell failed to perform his duty to report to his local board the fact that he was no longer living with his wife and children, but also that Figurell knew of this duty and intended not to perform it. See, e.g. United States v. Williams, 421 F.2d 600 (10th Cir. 1970); United States v. Rabb, 394 F.2d 230 (3d Cir. 1958). See also Ward v. United States, 344 U.S. 924, 73 S.Ct. 494, 97 L.Ed. 711 rev'g 195 F.2d 441 (5th Cir. 1952)."[3]
>
> 462 F.2d at 1081-1082

The record in the case at bar shows that Drew Devereaux was not hiding from the Selective Service. He really believed that mail would reach him through Ian Henderson or one of the other sources provided to the board. It appears that he was wrong. But Judge Brieant's charge to the jury allowed it to assume that Drew's poor judgment and misconceptions are the same as willful intent to violate the law.

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[3] See, also, the Court's excellent discussion of the whole law regarding intent in United States v. Figurell, supra, 1082-1083 fns. 4, 5.

CONCLUSION

The conviction should be reversed and the case should be remanded to the District Court with directions to dismiss the indictment with prejudice.

Dated: New York, New York
February 18, 1975

Respectfully submitted,

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ATTORNEY FOR DEFENDANT-APPELLANT.

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS:

ANN KESTLER, being duly sworn, deposes and says that she is secretary to the attorneys for the above named defendant-appellant herein. That on the 18th day of February, 1975, she served the within Brief of Defendant-Appellant upon Michael Q. Carey, Esq., Assistant United States Attorney, the attorney for the above named plaintiff-appellee, by depositing a true copy of the same securely enclosed in a post-paid wrapper in a Post Office Box regularly maintained by the United States Government at 1345 Avenue of the Americas, New York, N.Y. 10019, directed to said attorney for the plaintiff-appellee at United States Courthouse, Foley Square, New York, N.Y. 10007, that being the address within the State designated by him for that purpose upon the preceding papers in this action, or the place where he then kept an office between which places there then was and now is a regular communication by mail.

Deponent is over the age of eighteen years.

Sworn to before me

Ann Kestler

Ann Kestler

this 18th day of February, 1975.

Rochelle N. Krieger

ROCHELLE N. KRIEGER
Notary Public, State of New York
No. 31-4625148
Qualified in New York County
Commission Expires March 30, 1976